Supreme Court, U. S.
FILED
DEC 31 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. ~~75-9281~~

W. J. ESTELLE, JR., Director, Texas Department of Corrections, et al.
Petitioners

V.

The Hon. WILLIAM WAYNE JUSTICE, U.S. District Judge for the Eastern District of Texas,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
LONNY F. ZWIENER
ED IDAR, JR.
BERT W. PLUYMEN
Assistant Attorneys General

P. O. Box 12548
Austin, Texas 78711

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

Page

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS PRIMARILY INVOLVED 3

STATEMENT OF THE CASE 4

REASON FOR GRANTING THE WRIT 7

ARGUMENT AND AUTHORITIES 8

I. A Federal District Court Usurps Judicial And Legislative Power By Permitting The Intervention (Or Participation As Amicus Curiae *With Full Rights Of A Party)* Of The United States, Through The Attorney General, In A Civil Rights Suit, Based On 42 U.S.C. § 1983, Which Does Not Allege A Deprivation Of Constitutional Rights On Account Of Race, Color, Religion, Sex Or National Origin 8

II. A Federal District Court Usurps Power By Permitting The Intervention (Or Participation As Amicus Curiae *With Full Rights Of A Party)* Of A Litigant Without Standing 12

III. A Federal District Court Does Not Have Jurisdiction To Permit The Intervention Of The United States In A Civil Rights Suit Not Involving Allegations Of Discrimination 14

TABLE OF CONTENTS, (Cont.)

Page

IV. Federal Rule Of Civil Procedure 24(b) Does Not Cloak The Federal District Court With Power It Does Not Have 15

V. A Writ Of Mandamus Can And Should Issue To Check The Usurpation Of Judicial And Legislative Power By The Federal District Court 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: Page

Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970) 13

Braddy v. Southwestern Bell Telephone and Telegraph Co., 458 F.2d 666 (5th Cir. 1972) 15

In re Debs, 158 U.S. 564 (1895) 11

In re Estelle, 516 F.2d 480 (5th Cir. 1975)2, 7, 11, 12, 17

New York Times Co. v. United States, 403 U.S. 713 (1971) 10, 11

Ruiz v. Estelle, Cause No. 5523, docketed in the Eastern District of Texas, Tyler Division 4

Schlagenhauf v. Holder, 379 U.S. 104 (1964).... 16, 17

Sibbach v. Wilson & Co., 312 U.S. 1, 7-8 (1941).....15

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 13

TABLE OF AUTHORITIES (cont.)

United States v. Richardson, 410 U.S. 166 (1974) 13

Victoria Carriers, Inc. v. Law, 404 U.s. 202 (1971) 14

Warth v. Seldin, ——— U.S. ———, 95S.Ct. 2197 (1975) 12, 13, 14

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 10

COURT RULES:

FED R. CIV. P. 24 .....2, 3, 6, 15

FED. R. CIV. P. 82 15

28 U.S.C. §1254(1) 2

28 U.S.C. §1651 7

42 U.S.C. §§1971(c), 1971(d) 9

42 U.S.C. §§1973h(b), 1973h(c), 1973j(d) 1973j(e), 1973aa-2 and 1973bb-2 9

42 U.S.C. §1983 ..... 2, 4, 8

42 U.S.C. §§ 2000a-3, 2000a-5, 2000b, 2000c-6, 2000d-1, 2000e-5, 2000e-6 9

42 U.S.C. §§ 2000a-6(a), 2000b(a), 2000c-6(a) 14

42 U.S.C. § 2000h-2 ..... 3, 9, 14

42 U.S.C. §§ 3611, 3613 9

CONSTITUTION

U.S. CONST. amend. XIV, §5 8

U.S. CONST. amend. XV, §2 9

MISCELLANEOUS:

New York Times, October 17, 1963, at 27, col. 4 (Late City Ed.) 10

1964 U.S. Code Congressional and administrative News, 2355-2519 10

13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, §3522 (1975) ..14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. _____

* * *

W. J. ESTELLE, JR., Director, Texas Department of Corrections, et al.,
Petitioners

V.

THE HONORABLE WILLIAM WAYNE JUSTICE, U. S. District Judge for the Eastern District of Texas,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner,[1] W. J. Estelle, Jr., Director, Texas Department of Corrections, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 24, 1975.

---

[1]Though the members of the Texas Board of Corrections are parties herein as well as in the proceeding below, this Petition, in consonance with the opinion of the court below, will make reference only to Petitioner W. J. Estelle, Jr.

OPINION BELOW

The opinion-order of the Court of Appeals, issued as and for the mandate, *In re Estelle*, 516 F.2d 480 (5th Cir. 1975), appears in the Appendix at 31(a)-39. The orders entered by the District Court for the Eastern District of Texas, Tyler Division, allowing the United States to intervene pursuant to Fed.R.Civ.P. 24(b) and to participate as amicus curiae with "full rights of a party," appear in the Appendix at 25, 1-2, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 24, 1975. A timely petition for rehearing and suggested rehearing *en banc* was denied on October 6, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district court usurps judicial and legislative power by permitting the intervention (or participation as amicus curiae *with full rights of a party)* of the United States, through the Attorney General, in a civil rights suit based on 42 U.S.C. § 1983, which does not allege a deprivation of constitutional rights on account of race, color, religion, sex or national origin.

2. Whether a federal district court usurps power by permitting the intervention (or participation as amicus curiae *with full rights of a party*) of a litigant without standing.

3. Whether a federal district court has jurisdiction to permit the intervention of the United States in a civil rights suit not involving allegations of discrimination.

4. Whether Federal Rule of Civil Procedure 24(b) cloaks the federal district court with power it does not have.

5. Whether a writ of mandamus can and should issue to check the usurpation of judicial and legislative power by the federal district court.

STATUTORY PROVISIONS PRIMARILY INVOLVED

Federal Rule of Civil Procedure 24(b):

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal . . . governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

United States Code, Title 42

> § 2000h-2. Intervention by Attorney General; denial of equal protection on account

of race, color, religion, sex or national origin.

Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution *on account of race, color, religion, sex or national origin, the Attorney General for or in the name of the United States may intervene* in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action.
(Emphasis supplied).

STATEMENT OF THE CASE

The original action in the district court was commenced on November 24, 1972, by the named-plaintiff, David R. Ruiz, an inmate incarcerated at the Eastham Unit of the Texas Department of Corrections, against the Petitioner, as Director of the Texas Department of Corrections, (hereinafter referred to as TDC), alleging deprivation of certain constitutional rights. *Ruiz, et al. v. Estelle, et al.*, Cause No. 5523, docketed in the Eastern District of Texas, Tyler Division. By 1974, this cause had developed into a consolidated civil rights class action, brought pursuant to 42 U.S.C. §1983, alleging deprivation of constitutional rights of TDC inmates on Eighth Amendment cruel and unusual punishment grounds, which is to say, on grounds *other than* denial of equal protection due to race, color, religion, sex or national origin.

The pertinent developments which lead to the intervention of the United States began on April 12, 1974. By an order entered *sua sponte* on that day, the district court consolidated seven individual *pro se* prisoner civil rights actions against a number of

different defendants and ordered the United States to appear in the consolidated action "as *amicus curiae*, in order to investigate fully the facts alleged in the prisoners' complaints, to participate in such civil action *with the full rights of a party thereto*, and to advise this court at all stages of the proceedings as to any action deemed appropriate by it." See Appendix at 1-2. (Emphasis added).

By orders entered *sua sponte* on May 20 and 21, 1974, the district court consolidated an eighth similar *pro se* civil rights action and appointed Stanley Bass, Esquire, an attorney with the NAACP Legal Defense Fund, Inc. in New York City, to represent the plaintiffs in the consolidated action. This attorney subsequently moved for leave to file an amended complaint. The motion was granted by the Court on October 16, 1974. The amended complaint was filed as a class action naming W. J. Estelle, Jr., as the sole defendant and alleging that (1) medical care provided by the TDC was constitutionally inadequate, (2) prison security was inadequate to insure the physical well being of the inmates, (3) living conditions and working conditions at the TDC were constitutionally deficient, and (4) prison officials had unreasonably interfered with the access of prisoners to the courts and to their attorneys. None of the allegations in the amended complaint was grounded on racial or any other form of discrimination. See Appendix at 3-10. This is the present pleading of the Plaintiffs.

By order of November 18, 1974, William Bennett Turner, Esquire, of San Francisco, California, also an attorney associated with the NAACP Legal Defense Fund, Inc., was substituted for Mr. Bass as attorney for the plaintiffs. By a further order of December 12, 1974, the district court designated the action as a class action pursuant to FED. R. CIV. P. 23(b)(2) but deferred definition of the class and notice to the class.

On December 6, 1974, and after the present pleading of the Plaintiff was filed, the United States filed a motion to intervene as plaintiff in the action together with a complaint in intervention. Appendix at 11-24. The motion was granted by the district court the same day it was filed. Appendix at 25. The United States relied for its intervention on FED. R. CIV. P. 24(b)(2), on the "inherent authority of the United States, through its Attorney General, to sue to remedy severe and widespread deprivations of constitutional rights," and on its status as an amicus curiae with full rights of a party. See Appendix at 26-30.

On February 6, 1975, the United States filed a motion to add defendants and to file an amended complaint in intervention, which motion was granted. The amended complaint for the first time named, as defendants, the petitioners who are members of the Texas Board of Corrections.

On January 30, 1975, Petitioner moved that the United States be dismissed on the ground that it had no standing to intervene as a plaintiff or to proceed as *amicus curiae* with full rights of a party. On February 15, 1975, the district court denied Petitioner's motion to dismiss and refused to certify the question to the United States Court of Appeals for the Fifth Circuit for an immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

With all avenues for relief at the district court level foreclosed, Petitioner filed an application for writ of mandamus or other extraordinary relief in the United States Court of Appeals for the Fifth Circuit. That application was filed pursuant to 28 U.S.C. §1651, otherwise known as the All Writs Act. An order staying all proceedings by the United States was issued by that court on February 28, 1975. Oral arguments in said court were heard in April, 1975, and in a written opinion issued July 24, 1975, the court denied Petitioner's application and vacated its stay. *In re Estelle*, 516 F. 2d 480 (5th Cir. 1975); see Appendix at 31-39.

A motion for rehearing and suggestion for rehearing *en banc* was timely filed by Petitioner on August 6, 1975 and denied by the Fifth Circuit on October 6, 1975. See Appendix at 40. Subsequently, Petitioner's motion for recall and stay of judgment issued as mandate was denied by the Fifth Circuit on October 31, 1975. See Appendix at 41.

Thereafter, Petitioner filed an application for recall and stay of mandate with the Honorable Louis F. Powell, Jr., Associate Justice of this Court, requesting a stay pending the filing of this petition for writ of certiorari and a final determination of the matter by this Court. That application was denied by Mr. Justice Powell on November 25, 1975. See Appendix at 42.

REASON FOR GRANTING THE WRIT

Certiorari should be granted to determine a paramount nation-wide issue of first impression: whether a federal district court can be permitted to usurp powers it clearly does not have by permitting the United States to intervene (or participate as an amicus

curiae *with full rights of a party*)[2] in a civil rights suit, based on 42 U.S.C. §1983, wherein the United States has neither standing nor authority to participate.

ARGUMENT AND AUTHORITIES

I. A Federal District Court Usurps Judicial And Legislative Power By Permitting The Intervention (Or Participation As Amicus Curiae *With Full Rights Of A Party)* Of The United States, Through The Attorney General, In A Civil Rights Suit, Based On 42 U.S.C. § 1983, Which Does Not Allege A Deprivation Of Constitutional Rights On Account Of Race, Color, Religion, Sex or National Origin.

The Congress of the United States, pursuant to Section 5 of the Fourteenth Amendment [3] and Section 2

---

[2]Petitioner does not argue that the United States cannot participate as amicus curiae, if by "amicus curiae" is meant a neutral friend of the court. Petitioner does contend, however, that an amicus curiae *with full rights of a party* is a misnomer, a mere subterfuge by the distict court to allow the intervention of the United States without calling it intervention.

[3]"The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, §5.

of the Fifteenth Amendment, [4] has enacted numerous statutes which permit the United States or its Attorney General to institute or intervene in a civil rights suit in a number of specific instances--all involving allegations of discrimination on the basis of race, color, religion, sex or national origin. Thus, Title 42 U.S.C. §§1971(c), 1971(d), 1973h(b) and (c), 1973j(d) and (e), 1973aa-2 and 1973bb-2, all relate to discrimination in voting rights and provide authority for the United States or the Attorney General to sue. To the same effect are Title 42 U.S.C. §§ 2000a-3 and 2000a-5 (discrimination in use of specified public accomodations, the former providing for intervention by the Attorney General); § 2000b (discrimination in public facilities); § 2000c-6 (discrimination in public education); § 2000d-1 (action by particular federal departments or agencies to eliminate discrimination in federally assisted programs administered by each department or agency); §§2000e-5 and 2000e-6 (discrimination by employment); 2000h-2 (intervention in civil rights actions based on denial of equal protection on account of race, color, religion, sex or national origin); and §§3611 and 3613 (discrimination in housing). In sum, statutory authorization for participation by the United States as a party in civil rights litigation is limited to actions based on allegations of discrimination.

Not only is there no express authorization for active participation by the United States in a case such as the present one, but the Congress of the United States has considered and expressly rejected such a result. Drafts of the proposed Civil Rights Act of 1964 (42 U.S.C. §2000a *et seq.*) indeed vested broad intervention power in

---

[4]"The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, §2.

the Attorney General in cases involving issues of constitutional violations; however, these were soundly criticized for their broad scope and were subsequently discarded in favor of statutes expressly limiting the authority of the Attorney General to those instances involving discrimination. *See* 1964 U.S. Code Congressional and Administrative News, 2355-2519, particularly at 2409, 2411, 2414, 2450, 2469 and 2502 for criticism of proposals *not* enacted; *see* New York Times, October 17, 1963, at 27, col 4 (Late City Ed.)

Notwithstanding the foregoing, the United States has persistently argued in this case that it has "inherent standing to sue to enjoin widespread and severe deprivations of constitutional rights."[5] See, *e.g.*, Appendix at 27. However, it is now settled that when Congress has considered two alternative methods by which the Federal Government may proceed in a given situation, and it rejects one of the proposed alternatives, the Executive is not vested with the power to proceed by way of the rejected alternative, notwithstanding the gravity of the emergency or allegations of "inherent authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952); *see New York Times Co. v. United States*, 402 U.S. 713 (1971), particularly at 723 (Douglas & Black, JJ., concurring) and 741-47 (Marshall, J., concurring). In *Youngstown*, President Truman attempted to seize the nation's steel mills during war time to assure their continued operation in the face of a pending nationwide strike, even though Congress had

[5]The logical extension of this theory to each of the constitutional safeguards leads to a tremendous concentration of power in the hands of the federal government by means of provisions whose very purpose was to limit rather than extend its power. *See* 1964 U.S. Code Congressional and Administrative News 2450.

previously considered and rejected empowering the President to so act. In ruling against the President, the Court concluded that the executive branch possesses only those powers delegated to it by Congress and that the Constitution vests it with no inherent power or authority, thereby emphatically rejecting and tacitly overruling the notions of inherent executive authority previously suggested by *In re Debs*, 158 U.S. 564, 586 (1895).

Of the three judges who heard this case below, only one found a legal basis upon which the United States allegedly has authority to participate. He reasoned that Congress, by giving the United States criminal jurisdiction in civil rights cases, intended to give to the United States the power to redress a deprivation of constitutional rights in a civil action. *See In re Estelle*, 516 F.2d 480, 486-87 (5th Cir. 1975). However, such a conclusion is clearly erroneous in view of the fact that Congress has specifically considered granting such authority but refused to do so. See pages 9-10, *supra*. Moreover, the "principle of permitting civil relief where criminal sanctions are inadequate or ineffective," *Id.* at 487, was discredited in *New York Times Co. v. United States*, *supra*, particularly at 733-40 (White & Stewart, JJ., concurring) and 745-47 (Marshall, J. concurring), insofar as it pertains to the inherent authority of the United States to be an active participant in the present cause.

In sum, a federal district court usurps judicial

power and legislative power[6] by permitting the intervention (or participation as amicus curiae with full rights of a party) of the United States in a civil rights suit not involving allegations of discrimination.

II. A Federal District Court Usurps Power By Permitting The Intervention (Or Participation As Amicus Curiae *With Full Rights Of A Party)* Of A Litigant Without Standing.

Petitioner submits that the United States does not have standing to be an active litigant in this cause.

As stated recently by this Court in *Warth v. Seldin*,——— U.S. ———, 95 S.Ct. 2197 (1975):

> "[Standing] involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. (Citation omitted). In both dimensions it is founded in concern about the proper--and properly limited--role of the courts in a democratic society."
> *Id.* at 2205.

The United States clearly fails to meet the established

---

[6]This court should note that this case presents other disturbing problems of judicial usurpation. For example, at least one member of the Fifth Circuit panel indicated intervention proper "to insure that indigent plaintiffs receive the quality of legal representation commensurate with the rights of which they claim they have been deprived." *In re Estelle, supra* at 487 n.5. Irrespective of the appointment of other nationally eminent counsel herein, Petitioner questions such a judicial balancing of equities, when the Congress itself has considered it but refused to do so. *See, e.g.*, 42 U.S.C. § 2000b and § 2000c-6(b) where Congress did balance the equities in other contexts.

requisites of either category of standing.

In order to supersede the constitutional limitation on federal court jurisdiction, a litigant must show that the challenged action has caused him injury in fact. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152 (1970). As delineated by this Court in *United States v. Richardson*, 418 U.S. 166, 179-80 (1974):

> "The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' *Baker v. Carr* . . . or a 'particular concrete injury,' *Sierra Club v. Morton* . . ., 'that he has sustained . . . a direct injury . . . .' *Ex parte Levitt* . . . ."

and reiterated in *Warth v. Seldin, supra* at 2205:

> "[T]he standing question is whether the (litigant) has 'alleged such a personal stake in the outcome of the controversy' to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers in his behalf."
> (Emphasis in original).

The United States clearly fails to satisfy these requisites, and the district court has no judicial power to permit its participation as a litigant, even though it could and should proceed to resolve the issues as framed by the parties having standing to sue. *See United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

Other limitations on "the class of persons who may invoke the courts' decisional and remedial powers" include the requirement that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, supra* at 2205. The United States falls

squarely within this prohibition, its claim being based on the constitutional rights of others. Though Congress may remove this disability "either expressly or by *clear* implication," and pursuant thereto, the United States "indeed, may invoke the general public interest in support of (its) claim," *Id.* at 2206 (emphasis supplied), the Congress has expressly considered and refused to so act. See pages 9-10, *supra.*

In sum, the federal district court below usurped power by inviting and subsequently permitting the participation of the United States when it clearly lacked the foregoing requisites for standing.

III. A Federal District Court Does Not Have Jurisdiction To Permit The Intervention Of The United States In A Civil Rights Suit Not Involving Allegations Of Discrimination.

The federal courts have jurisdiction only as granted by Congress. 13 WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE, §3522 (1975); *Victoria Carriers, Inc. v. Law*, 404 U.S. 202 (1971). Therefore, each authorization contained in the Civil Rights Acts of 1964 for the institution of suits by the Attorney General also granted jurisdiction to the federal courts over the relevant causes. *E.g.*, 42 U.S.C. §§2000a-6(a), 2000b(a), 2000c-6(a). Moreover, Congress has authorized the United States to intervene in any action containing allegations of discrimination on account of race, color, religion, sex or national origin, (42 U.S.C. §2000h-2), thereby giving the federal courts

jurisdiction to permit intervention under Rule 24 of the Federal Rules of Civil Procedure in cases alleging discrimination.[7] However, Congress has not authorized the United States to intervene in an action not containing allegations of discrimination, and a federal court is without jurisdiction to permit intervention in such cases.

IV. Federal Rule Of Civil Procedure 24(b) Does Not Cloak The Federal District Court With Power It Does Not Have.

The opinion below of the United States Court of Appeals for the Fifth Circuit is erroneously based upon Rule 24(b) of the Federal Rules of Civil Procedure.

It is fundamental that the Federal Rules of Civil Procedure do not create or enlarge either the substantive rights of a litigant, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 7-8 (1941), or the jurisdiction of the district courts, FED. R. CIV. P. 82; *Braddy v. Southwestern Bell Telephone and Telegraph Co.*, 458 F.2d 666, 669 (5th Cir. 1972). Thus, Rule 24(b) neither confers standing upon the United States nor jurisdiction upon the district court. Additionally, Rule 24(b) does not empower the district court to grant authority to the United States which it does not have and which Congress has expressly refused to convey.

V. A Writ Of Mandamus Can And Should Issue To Check The Usurpation Of Judicial And Legislative Power By The Federal District Court.

---

[7]Also note 42 U.S.C. § 2000a-3(a), wherein a district court is granted the authority to permit the intervention of the Attorney General in yet another context.

In *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), the Supreme Court reviewed a determination by a court of appeals not to issue its writ of mandamus to compel a district court to set aside an order under Rule 35 of the Federal Rules of Civil Procedure requiring the mental and physical examination of a defendant in a civil action. The court of appeals had recognized its jurisdiction to issue the writ but had declined to do so on the merits. Agreeing with the decision that the court had that power and reversing the court on the merits, the Supreme Court said:

> " 'The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been *to confine an inferior court to a lawful exercise of its prescribed jurisdiction* * * * ,' Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26.
>
> "It is, of course, well settled, that the writ is not to be used as a substitute for appeal, Ex parte Fahey, 332 U.S. 258, 259-260, even though hardship may result from delay and perhaps unnecessary trial, Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-383; United States Alkali Export Assn. v. United States, 325 U.S. 196, 202-203; Roche v. Evaporated Milk Assn., supra, at 31. *The writ is appropriately issued, however, when there is 'usurpation of judicial power'* or a clear abuse of discretion, Bankers Life & Casualty Co. v. Holland, supra, at 383.
>
> "Here *petitioner's basic allegation was lack of power* in a district court to order a mental and physical examination of a defendant."
> *Id.* at 109-110. (Emphasis supplied.)

The present case falls squarely within the holding of *Schlagenhauf v. Holder* and the principles delineated by the authorities cited therein. In both *Schlagenhauf* and the instant case, the petition alleged a substantial question of usurpation of power. In both instances, the usurpation was accomplished by an unwarranted reliance upon a federal rule of civil procedure. In both, the issue presented was an important one of first impression. *Id.* at 110; *In re Estelle, supra* at 485.

Finally, Petitioner would direct the Court's attention to the numerous pending cases involving the intervention of the United States in circumstances such as presented here to substantiate the urgency and importance of the instant request. See Addendum to Brief for the United States, a part of which is reproduced in the Appendix hereto at 43-45. Moreover, an appeal after judgment by Petitioner (or similarly situated litigants) would necessarily be an ineffective remedy to correct the usurpation of power by the district court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Div.

LONNY F. ZWIENER
Assistant Attorney General

ED IDAR, JR.
Assistant Attorney General

BERT W. PLUYMEN
Assistant Attorney General

P. O. Box 12548
Austin, Texas 78711

ATTORNEYS FOR
PETITIONER

CERTIFICATE OF SERVICE

I, Joe B. Dibrell, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Petitioner. I do therefore certify that three copies of the foregoing Petition have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the _____ day of December, 1975, addressed to:

Hon. Wm. Wayne Justice
U.S. District Judge
Eastern District of Texas
P. O. Box 539
Tyler, Texas 75701

Mr. Jack W. Flock
Mr. Michael A. Hatchell
Fifth Floor
Citizens First National
Bank Building
Tyler, Texas 75701

Mr. Roby Hadden
United States Attorney
310 Federal Building
Tyler, Texas 75701

Mr. John C. Hoyle
Attorney at Law
U.S. Department of Justice
Washington, D.C. 20530

Mr. Stanley Pottinger
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Mr. William B. Turner
12 Geary Street, 8th Floor
San Francisco, California
94108

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Div.